

SPORT SQUEEZE, INC., Plaintiff, vs. PRO-INNOVATIVE CONCEPTS, INC. et al., Defendants.

CASE NO. 97-CV-115 TW (JFS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

1999 U.S. Dist. LEXIS 16681; 51 U.S.P.Q.2D (BNA) 1764

March 31, 1999, Decided

April 1, 1999, Filed

CASE SUMMARY

PROCEDURAL POSTURE: The court construed the disputed claim language in plaintiff's suit against defendant for patent infringement.

OVERVIEW: Plaintiff sued defendant for patent infringement involving a hand-held exercise ball. Defendant was the purported inventor and owner of three patents related to the exercise balls. The invention was a core of tightly-packed dry particles surrounded by layers of latex balloons. The court held a claim construction hearing to determine the meaning of the word particles. The court considered the disputed claims language and the meaning of the term particles, as a matter of law. The three patents contained a wide spectrum of language regarding particles, describing them in narrow and in broad terms. In all three patents, when defendant sought to limit the particles in its claims to a particular size or shape, it qualified the term by including the size or shape limitation. The court concluded that the term particles in the second and third patents meant particles in its ordinary sense without limitation based on the size or shape of millet. Specifically, the court found that the term particles contemplated small specks of matter, including but not limited to, starch particles, microsphere particles, hard plastic or silicon beads and millet.

OUTCOME: The court issued an order resolving only the issue of claim construction finding that the term particles in the claims of two patents meant particles in the ordinary sense without limitation on size or shape of millet; however, the court expressed no opinion on the determination of infringement.

CORE CONCEPTS

Patent Law : Infringement : Claim Interpretation

Construing a claim to determine its scope and meaning, also known as claim construction, is a pure question of law for the court. The language of the claim defines the scope of the protected invention. Words in a patent claim are construed as they would be understood by a reader skilled in the relevant art unless it appears that the inventor used the words differently.

Patent Law : Infringement : Claim Interpretation

When interpreting disputed claim language, the court must first look to intrinsic evidence, including the patent itself, including the claims, the specification and, if in evidence, the prosecution history.

Patent Law : Infringement : Claim Interpretation

There is presumed to be a difference in meaning and scope when different words or phrases are used in separate patent claims. To the extent that the absence of such a difference in meaning and scope would make a claim superfluous, the doctrine of claim differentiation states the presumption that the difference between claims is significant. The doctrine of claim differentiation has its greatest force when an interpretation of a dependent and independent claim would render the dependent claim superfluous. The doctrine may also be used to interpret an independent claim in light of another independent claim.

Patent Law : Infringement : Claim Interpretation

Although the doctrine of claim differentiation may at times be controlling, construction of claims is not based solely upon the language of other claims; the doctrine cannot alter a definition that is otherwise clear from the claim language, description, and prosecution history.

Patent Law : Infringement : Claim Interpretation

While the specification may aid the court in interpreting the meaning of disputed claim language, particular embodiments and examples appearing in the specification will not generally be read into the claims.

Civil Procedure : Preclusion & Effect of Judgments : Law of the Case Doctrine

The law of the case doctrine merely expresses the practice of a court generally to refuse to reopen what has been decided. It is not a limit to the court's power. The court retains inherent authority to revise interim or interlocutory orders any time before judgment, including orders denying motions for summary judgment. Fed. R. Civ. P. 54(b).

COUNSEL:

[*1] For SPORT SQUEEZE, INC., plaintiff: Jeffrey R. Smith, Smith and Brown, San Diego, CA.

For PRO-INNOVATIVE CONCEPTS, INC., MARK A. SCATTERDAY, defendants: Steven J. Nataupsky, Knobbe Martens Olson and Bear, Newport Beach, CA.

For PRO-INNOVATIVE CONCEPTS, INC., MARK A. SCATTERDAY, defendants: Albert L. Schmeiser, Mesa, AZ.

For PRO-INNOVATIVE CONCEPTS, INC., MARK A. SCATTERDAY, counter-claimants: Steven J. Nataupsky, Knobbe Martens Olson and Bear, Newport Beach, CA.

For SPORT SQUEEZE, INC., counter-claimant: Jeffrey R. Smith, Smith and Brown, San Diego, CA.

JUDGES:

Judge THOMAS J. WHELAN, United States District Court, Southern District of California.

OPINIONBY:

THOMAS J. WHELAN

OPINION:

ORDER RE: CLAIM CONSTRUCTION

I. Introduction

In accordance with the Federal Circuit's ruling in *Markman v. Westview Instruments*, 52 F.3d 967, 970-71

(*Fed. Cir.* 1995) (en banc), aff'd 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996), a claim construction hearing was held on March 5, 1999. Stephen Beuerle, Robert Laurenson and John Benassi appeared for plaintiff Sport Squeeze, Inc. Steven Nataupsky, Ann Byun and Darrell Olson appeared for defendants Pro-Innovative [*2] Concepts, Inc. and Mark Scatterday.

The court has considered the three patents at issue in this case, the specifications and file histories of the three patents, all briefs submitted by the parties including supporting declarations and oral arguments made at the hearing, which are incorporated herein by reference. By this order, the court construes the disputed claim language as a matter of law.

II. Background

This is a patent infringement lawsuit involving a deformable hand-held exercise ball. Defendant Mark Scatterday is the purported inventor and owner of three patents related to exercise balls which are squeezed in the hand to relieve stress and exercise the limbs. The invention consists of a core of tightly packed dry particles surrounded by layers of resilient latex balloons, enabling the ball to be squeezed into deformable shapes. Scatterday's company Pro-Innovative Concepts, Inc. ("Pro-Innovative") manufactures and sells an exercise ball called "The Gripp(R)" which embodies one of the ways the invention may be implemented.

Scatterday owns three United States Patents on the exercise grip. The first patent, U.S. Patent number 5,190,504 ("the '504 Patent"), was issued [*3] to Scatterday on March 2, 1993. The second patent, U.S. Patent number 5,350,342 ("the '342 Patent") was a continuation patent from the '504 Patent issued to Scatterday on September 27, 1994. The third patent, U.S. Patent number 5,556,358 ("the '358 Patent") was a continuation patent to the '342 Patent and was issued on September 17, 1996.

Pro-Innovative alleges that plaintiff Sport Squeeze International ("Sport-Squeeze") manufactured and sold its own squeeze ball under the brand name "Ad Squeeze." Pro-Innovative contends that the Ad Squeeze ball infringes Claims 1, 4-6 and 8 of the '342 Patent and Claims 1-4 of the '358 Patent. n1

n1 As the parties noted in their briefs, the court has received commercial samples of both THE GRIPP(R) and the Ad Squeeze products produced by the parties. The court is aware that the construction of the claims in a patent does not depend on how those patents were commercially implemented. See, e.g., *Zenith Lab. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418, 1423 (*Fed. Cir.*

1994); *International Visual Corp. v. Crown Metal Mfg. Co.*, 991 F.2d 768, 771-72 (Fed. Cir. 1988). The commercial samples furnished by both Sport-Squeeze and Pro-Innovative played no part in the court's consideration of the arguments of the parties or the court's determination of how the disputed patent language should be construed.

[*4]

III. "Particles"

For the claim construction hearing, Claims 2-4 of the '358 Patent were at issue. The parties agree that the only claim term that is in dispute is the word "particles" as it appears in independent Claim 2. n2 Thus, the purpose of the Markman hearing was to determine the meaning of the word "particles." Independent Claim 2 of the '358 Patent, in its entirety, reads as follows: (See Column 6, Lines 5-20).

n2 The term "particles" is also found in Claims 1 and 8 of the '342 Patent and Claim 1 of the '358 Patent.

2. A semi-resilient exercise grip comprising:

a core containing a deformable mixture of tightly packed individual dry particles that are in continuous contact with each other; and

a resilient covering surrounding said core, wherein said covering is in the form of a plurality of nested sacks, wherein each sack is made of a resilient material and includes an opening, and wherein the sacks are located about the core, the openings of adjacent sacks are spaced [*5] apart from each other, and wherein each sack applies its own inward force on the core and the total inward force on the core is the combined total of the individual inward forces exerted on the core by each of the sacks making up the covering.

Claims 3 and 4 of the '358 Patent further limit the coverings of the exercise grip. Dependent Claims 2 and 3, in their entirety, read as follows: (See Column 6, Lines 21-25).

3. The grip of claim 2 wherein each of the sacks that make up the covering are substantially ball-shaped when in a non-stressed state.

4. The grip of claim 2 wherein each of the sacks are made of a latex rubber material.

Sport Squeeze contends that the term "particles" is limited to particles that are similar in size and shape to millet (roughly the size of bird seed), which is one of the examples of particles disclosed in the Scatterday patents. The allegedly infringing Ad Squeeze product uses silicon beads which are much smaller in size than millet. Accordingly, Sport-Squeeze contends that the term "particles" is limited to larger, millet-sized particles, which, under its proffered construction, would result in the Ad Squeeze product [*6] not infringing the asserted claims.

In opposition, Pro-Innovative contends that the term "particles" should be given its broad and ordinary meaning which includes particles not limited in size and shape to millet. Specifically, Pro-Innovative requests the court to construe the term "particles" to mean "small specks of matter which include starch particles, microsphere particles, hard plastic or silicon beads and millet."

IV. Discussion

A. Legal Standards

a. Construing the Term "Particles" in the '342 and '358 Patents is a Question of Law for the Court

Construing a claim to determine its scope and meaning, also known as "claim construction," is a pure question of law for the court. *Markman*, 52 F.3d 967, 970-71. The language of the claim defines the scope of the protected invention. *Bell Communications Research v. Vitalink Communications Corp.*, 55 F.3d 615, 619-620 (Fed. Cir. 1995). "Words in a patent claim are construed as they would be understood by a reader skilled in the relevant art unless it appears that the inventor used the words differently." *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 531 (Fed. Cir. 1997). [*7]

When interpreting disputed claim language, the court must first look to "intrinsic" evidence, including "the patent itself, including the claims, the specification and, if in evidence, the prosecution history." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996) (citing *Markman*, 52 F.3d at 979). The parties agree that the disputed claim language can be construed with reference to intrinsic evidence only. Thus, it would be improper to look to extrinsic evidence. *Id.* at 1583.

b. The Doctrine of "Claim Differentiation"

"There is presumed to be a difference in meaning and scope when different words or phrases are used in separate [patent] claims. To the extent that the absence of such [a] difference in meaning and scope would make a claim superfluous, the doctrine of claim differentiation states the presumption that the difference between claims is significant." *Tandon Corp. v. U.S. Int'l Trade Comm'n*,

831 F.2d 1017, 1023 (Fed. Cir. 1987). The doctrine of claim differentiation has its greatest force when an interpretation of a dependent and independent claim would render the dependent claim superfluous. [*8] *Beachcombers v. WildeWood Creative Products, Inc.*, 31 F.3d 1154, 1162 (Fed. Cir. 1994) (interpretation that renders dependent claim superfluous is "presumptively unreasonable" under doctrine of claim differentiation); *United States v. Teletronics, Inc.*, 857 F.2d 778, 783 (Fed. Cir. 1988) (where some claims are broad and others narrow, the narrow claim limitations cannot be read into the broad claims). The doctrine may also be used to interpret an independent claim in light of another independent claim. See, e.g., *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1055 (Fed. Cir. 1988); *Caterpillar Tractor Co. v. Berco, SPA*, 714 F.2d 1110, 1116 (Fed. Cir. 1983).

"Although the doctrine of claim differentiation may at times be controlling, construction of claims is not based solely upon the language of other claims; the doctrine cannot alter a definition that is otherwise clear from the claim language, description, and prosecution history." *O.I. Corp. v. Tekmar Co., Inc.*, 115 F.3d 1576, 1582 (Fed. Cir. 1997); see also *Comark Communications, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998) [*9] ("While we recognize that the doctrine of claim differentiation is not a hard and fast rule of construction, it does create a presumption that each claim in a patent has a different scope.").

B. Claim Differentiation Supports Pro-Innovative's Construction

Pro-Innovative argues that its three exercise grip patents contain a wide spectrum of language regarding certain "particles," describing them in narrow and broad terms. It argues that the claims of the '342 Patent use the term "particles" both with and without qualifying language, and that the '358 Patent includes no language limiting "particles" based on size and shape. Upon review of the three patents, the court finds that the doctrine of claim differentiation supports Pro-Innovative's position.

1. The '504 Patent

Claim 1 of the first patent issued to Scatterday, the '504 Patent issued in 1993, limited the "particles" used to fill the exercise ball to millet-sized particles. (See Column 5, Lines 23-26).

1. A semi-resilient exercise grip comprising a nonresilient core containing a deformable mixture of individual particles identical in size and shape to millet

Claim 7 of the '504 Patent is also [*10] limited to "millet-sized" particles. (See Column 6, Lines 15-19).

The parties do not dispute that the plain language of Claim 1 of the '504 Patent and the patent's prosecution history confirm that Claim 1 is limited to millet-sized particles.

2. The '342 Patent

However, the term "particles" in the subsequently issued '342 Patent is not expressly limited to "millet-sized" particles. Specifically, Claims 1-3 of the '342 Patent read: (See Column 5, Lines 27-43; Column 6, Line 1).

1. A semi resilient exercise grip comprising a non-resilient dry core containing a deformable mixture of tightly packed individual particles that are in continuous contact with each other.

2. The grip of claim 1 wherein the particles are hard and are similar in size and shape to millet.

3. The grip of claim 2 wherein the particles are millet.

Applying the doctrine of claim differentiation, the term "particles" in Claim 1 cannot be limited to particles "similar in size and shape to millet." Under such a construction, Claim 2 would have the same scope as Claim 1, rendering Claim 2 superfluous--a construction that is "presumptively unreasonable." [*11] *Beachcombers*, 31 F.3d at 1162. Sport Squeeze presented no evidence during the hearing or in its papers rebutting the strong presumption that the "millet-sized" limitations in dependent Claim 2 should not be incorporated into Claim 1.

Sport Squeeze argues that the prosecution history of the '342 Patent supports a narrow reading of the term "particles." Specifically, Sport Squeeze emphasizes that the Patent Office rejected the initial Claim 7 as obvious under U.S. Patent No. 3,601,923 issued to Rosenberg. (See Sport Squeeze Exhibit G). n3 To overcome the Patent Office's rejection, Scatterday limited the "particles" in initial Claim 7 to "substantially millet-sized" particles and explained to the Patent Examiner that the "millet-sized" particles in the revised claim distinguished the claim from Rosenberg, which used considerably smaller starch particles. (See Sport Squeeze Exhibit B, at 6-7 (Stamp no. 122-123) (stating that "the tiny particles used by Rosenberg form a crucial component of his invention.")). n4

n3 The claim which became Claim 7 of the '342 Patent was originally designated as Claim 15 in Scatterday's earlier applications. For purposes of this Order, the court will refer to Claim 15 as

the "initial Claim 7," and the claim issued by the patent office as "issued Claim 7." [*12]

n4 The Patent Office also rejected various claims of the '342 Patent under the doctrine of "double-patenting." Scatterday subsequently filed a terminal disclaimer to cure the rejection so that all three patents ('504, '342, and '358) would expire on the date of the first patent. See *In re Goodman*, 11 F.3d 1046, 1052 (Fed. Cir. 1993) (filing of terminal disclaimer cures double patenting rejection).

In essence, Sport-Squeeze argues that the prosecution history of Claim 7 (which resulted in a claim dependent upon "millet-sized" particles) supports its contention that the "millet-sized" limitation should be implied into claims that do not contain this limitation. This argument is unpersuasive. The fact that Scatterday limited "particles" in initial Claim 7 to "millet-sized" particles while leaving "particles" in Claim 1 without such a limitation supports Pro-Innovative's contention that the term "particles," standing alone, is not limited to particles that are millet-sized. Moreover, the difference between the "particles" in Claim 1 and issued Claim 7 provides additional support [*13] for Pro-Innovative's arguments that claim differentiation forecloses a construction of the term "particles" limited to particles that are millet-sized. n5

n5 Sport-Squeeze argues that Scatterday represented to the Patent Office during prosecution of the '342 Patent that millet-sized particles were essential to the semi-resilient nature of the exercise grip. (See Sport-Squeeze's Opening Brief at 9-10 (quoting Sport-Squeeze's Exhibit I, at 6)). However, those comments were made in reference to a claim which *explicitly* contained a "millet-sized" limitation. Thus, Sport-Squeeze's "file wrapper estoppel" arguments concerning the other claims are without merit as this explanation was not offered to obtain allowance on any other claim. Moreover, Sport-Squeeze presented no evidence during the Markman hearing that the invention's semi-resilient characteristics depend upon millet-sized particles. In any event, this statement does not overcome the presumption raised by the doctrine of claim differentiation.

[*14]

3. The '358 Patent

Approximately two years after the '342 Patent was issued, the Patent Office awarded Scatterday the '358 Patent, the primary patent at issue here. Significantly, unlike the '504 and '342 Patents, the term "millet" does not appear in any of the issued claims of the '358 Patent. The sole mention of "millet" appears in the specification: (See Column 3, Lines 10-15):

In practice, seeds such as millet have been used as the particles. As an alternative, the particulate [sic] material can be hard plastic or silicon beads or any other matter that is similar in size and shape to millet and that is hard enough to withstand the compressive pressures experienced when the grip is being squeezed by a user.

Sport-Squeeze argues that this language discloses that the "particles" in the '358 Patent are limited to millet-sized particles. However, while "the specification may aid the court in interpreting the meaning of disputed claim language, particular embodiments and examples appearing in the specification will not generally be read into the claims." *Comark Communications, Inc.*, 156 F.3d 1182 at 1187; see also *Lairtram Corp. v. Cambridge Wire Cloth Co.*, 863 F.2d 855, 865 (Fed. Cir. 1988) [*15] ("References to a preferred embodiment, such as those often present in a specification, are not claim limitations."). Sport-Squeeze has provided no basis for reading the specification's illustrative use of "millet-sized" into the claims of the patent. The court has found nothing in the long and somewhat confusing prosecution history of the '358 Patent which would warrant a narrow reading of "particles" inconsistent with its plain meaning and the construction of that term in the '342 Patent.

With all three patents, when Pro-Innovative sought to limit the "particles" in its claims to a particular size or shape, it qualified that term by including the limitation that the particles be the size or shape of "millet." When Pro-Innovative did not wish to limit the size or shape of the "particles," it did not include any size or shape limitation.

i. Application of Claim Differentiation to the '358 Patent

Sport-Squeeze contends that the doctrine of claim differentiation cannot be applied to the '358 Patent because the doctrine is "inapplicable to continuation patents." The sole case Sport Squeeze relies upon, *Jonsson v. Stanley Works*, 903 F.2d 812 (Fed. Cir. 1990), [*16] held that the prosecution history of one patent can be used to determine the scope and to interpret the meaning of another patent where both patents stem from a common parent application. 903 F.2d at 818. The court found it unnecessary to apply the doctrine of claim differentiation because the court's finding that the claim

contained a limitation existing in a separate dependent claim was supported by the prosecution history, the patent, the specifications, and deposition testimony. *Id.* at 820 ("Hence, since it is apparent that the court had ample evidence to determine the scope of the '912 patent, Jonsson's reliance on claim differentiation requires no discussion."). Thus, Jonsson merely reinforces the rule that the doctrine of claim differentiation can be overcome by a patent's prosecution history. n6

n6 Most of the sections of Jonsson quoted in Sport-Squeeze's Opening Brief were not the opinion of the court, but rather arguments asserted by the parties.

In this case, however, [*17] the court need not necessarily rely upon the doctrine of claim differentiation to conclude that the "particles" in the '358 Patent are not limited to "millet-sized" particles. As discussed in the preceding section of this order, nothing in the prosecution history or specifications justifies departing from the plain meaning of the term "particles." Rather, the prosecution history of all three patents reveals that both Scatterday and the patent examiner understood that differing particle sizes were significant in light of Tarnoff and Rosenberg.

Although not necessary to the court's conclusion, it notes that the doctrine of claim construction may provide additional support for Pro-Innovative's position. All three patents (1) involved the deformable exercise grip, (2) were issued over a relatively short period (three years), (3) involved the same patent examiner (Stephen Crow), and (4) made reference to the same prior art references. These facts support the court's conclusion that the term "particles" in the '358 Patent should be construed consistently with that term in the '342 Patent.

V. Sport-Squeeze's Arguments in Opposition

Sport-Squeeze presents two main arguments to [*18] support its contrary position that the "particles" in the '358 Patent must be millet-sized. First, Sport-Squeeze argues that the term "particles" should be narrowly construed to avoid conflict with prior art patents. Second, Sport-Squeeze argues that Judge Moskowitz previously ruled that the "particles" in the '342 and '358 Patents are millet-sized and that this determination is "law of the case."

a. Sport-Squeeze's Argument that a Narrow Reading of "Particles" is Necessary to Avoid Invalidation in light of Tarnoff is Logically Flawed

Sport-Squeeze argues that a broad construction of "particles" should be avoided because such a

construction would read back on the Tarnoff prior art. According to Sport-Squeeze, a broad reading of the term "particles" would render the '342 and '358 Patents invalid under Tarnoff and Rosenberg because both of these patents use microspheres that are substantially smaller than millet.

Sport-Squeeze's argument is logically flawed because it assumes the term "particles" must be analyzed as an isolated term, construed outside the context of the claim it limits. In fact, it is of little consequence that a *single term* in a patent claim reads back [*19] on a term in a prior art patent so long as the claim as a *whole* does not read back on a claim in the prior art. Here, particle size is only one of many possible limitations contained in the claims of the '342 and '358 Patents. (See, e.g., Pro-Innovative's Exhibit 369). Claim 2 of the '358 Patent, for example, contains numerous limitations not found in Tarnoff or Rosenberg, including: (1) a plurality of nested sacks, (2) openings of adjacent sacks that are spaced far apart from one another, (3) each sack applies inward force on the core, and (4) the total inward force is the combined total of the individual inward forces. *Id.* These limitations, rather than an implied limitation on particle size, likely formed the basis for patentability of Claim 2. n7

n7 In its Reply brief, Sport-Squeeze contends that "to have any differentiation between the claimed squeeze ball and the prior art, the term 'particle' must be defined as including particles approximately millet-like, but excluding microspheres ranging from 0.0001 inches to 0.06 inches." (See Sport Squeeze's Reply at 6:17-19). A similar argument appears in its Opening brief, where Sport-Squeeze argues that a narrow reading of the term "particle" is necessary to avoid conflict with Tarnoff. (See Sport-Squeeze's Opening Brief at 5:11-15). This arguments are rejected for the reasons stated in the text.

[*20]

Thus, the court rejects Sport-Squeeze's argument that the term "particles" must be construed narrowly because the term may read back on the microspheres of Tarnoff. Moreover, Sport-Squeeze made no arguments during the Markman hearing or in its briefs that the broad construction of "particle" urged by Pro-Innovative would cause any of the *claims* of the '342 or '358 Patents to read back on Nichols, Rosenberg, Cherk, or Tarnoff.

b. Judge Moskowitz's Previous Ruling is not "Law of the Case"

Sport-Squeeze relies heavily upon the language of two orders from Judge Moskowitz, both dated August 10, 1998. (See Sport-Squeeze Exh. D, E). Sport-Squeeze relies particularly on page 5 of Judge Moskowitz's August 10, 1998 order denying Pro-Innovative's motion for summary judgment. (See Order Denying Motion for Summary Judgment on Patent Infringement (Doc # 106)). In that order, Judge Moskowitz rejected Pro-Innovative's contention that the term "particles" in the '358 Patent consisted of particles of any shape and size. He noted that this construction was "incredibly broad" and "unsupported by the record." (See id. at 5:15-23). Sport-Squeeze contends that Judge Moskowitz's [*21] ruling is "law of the case" and is binding on this court. The court finds this argument unpersuasive for two reasons.

First, the sole issue before Judge Moskowitz was whether Pro-Innovative was entitled to summary judgment on the issue of Sport-Squeeze's alleged infringement of the '358 patent. Since a Markman hearing had not been conducted, the question of claim construction was not before the court. In fact, in a footnote Judge Moskowitz observed that the parties had failed to lodge the Rosenberg and Tarnoff patents, and that without those references, "the Court cannot at this time determine whether 'particles' should be construed to include the 'size and shape of millet' limitation urged." (See id. at 6 n.2). n8 At the conclusion of his order, Judge Moskowitz scheduled a Markman hearing and set a briefing schedule, negating any inference that he intended his previous order to serve as the final word on the construction of the three Scatterday patents.

n8 Judge Moskowitz's order adopted Sport-Squeeze's argument that the term "particles" must be narrowly construed to avoid reading back on the particle-size aspect of the Tarnoff prior art. (See Part IV.a, *supra*). This conclusion was understandable since Judge Moskowitz did not have the Tarnoff prior art available to him at the time of the ruling.

[*22]

Second, the court notes that, to the extent "law of the case" is applicable, it "merely expresses the practice of [a] court[] generally to refuse to reopen what has been decided." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912)) (Holmes, J.). It is not a limit to the court's power. Id.; *Capital Investors Co. v. Executors of Morrison's Estate*, 584 F.2d 652, 654 (4th Cir. 1978) ("The principle [of law of

the case] is not absolute nor inflexible."). The court retains inherent authority to revise interim or interlocutory orders any time before judgment, including orders denying motions for summary judgment. See, e.g., FED. R. CIV. P. 54(b) (any order not certified under Rule 54(b) and which adjudicates fewer than all the claims as to all the parties "is subject to revision at any time before the entry of [final] judgment"); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 465 (9th Cir. 1989) ("Courts have inherent power to modify their interlocutory orders [*23] before entering a final judgment."); *Curran v. Kwon*, 153 F.3d 481, 487 (7th Cir. 1998) ("When a district judge is presented with additional evidence, therefore, he is free to revisit a denial of summary judgment."). Thus, even assuming the issue of claim construction was addressed in the court's August 10, 1998 Order, the doctrine of "law of the case" would not preclude this court from revisiting the issue, especially where, as here, the parties presented evidence and argument they did not present at the time the court issued its previous order.

VI. Conclusion

For the foregoing reasons, the court concludes that the term "particles" in the claims of United States Patent Nos. 5,350,342 and 5,556,358 means particles in its ordinary sense without limitation based on the size or shape of millet. Specifically, the court finds that the term "particles" contemplates small specks of matter, including but not limited to, starch particles, microsphere particles, hard plastic or silicon beads and millet. n9

n9 This order resolves only the issue of claim construction. The court expresses no opinion on the determination of infringement, the applicability of any defenses Sport-Squeeze may wish to assert, or the viability of the non-patent claims.

[*24]

Finally, the motion cut-off date in this matter is continued until June 14, 1999. n10

n10 The parties may contact the court to obtain hearing dates for subsequent motions. The court notes that it may need to reset the pretrial conference date set for June 1, 1999 if additional motions are filed.

IT IS SO ORDERED.

Dated: March 31, 1999

Judge THOMAS J. WHELAN

United States District Court
Southern District of California

09533906-021202